

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
December 17, 2007

D048386 Lacher et al. v. East County Investigations

The order is reversed and the trial court directed to enter a new order denying Lachers' motion for partial satisfaction and for a determination of the proper amount of attorney fees on appeal in accordance with this opinion. In addition to attorney fees, appellants shall recover costs on appeal. O'Rourke, J.; We Concur: Huffman, Acting P.J., McDonald, J.

D049067 Hampton Realty and Mortgage v. Krouse et al.

The judgment is reversed in part and affirmed in part. The jury's \$9,500 breach of contract damages award is reversed, as is the award of contractual attorney fees and costs in favor of Hampton. As so modified, the judgment is affirmed. The parties shall bear their own costs on appeal. Nares, J.; We Concur: Huffman, Acting P.J., McDonald, J.

D050746 People v. Whitman

The judgment is affirmed. Aaron, J.; We Concur: McConnell, P.J., Haller, J.

D051634 In re Shaffer on Habeas Corpus

The petition for writ of habeas corpus has been read and considered by Justices Nares, McDonald and Irion. We take judicial notice of the record on appeal in *People v. Shaffer* (D040650).

In 2002 petitioner Robert Shaffer pleaded guilty to taking or knowingly driving a stolen vehicle. In addition, he admitted to having a prior conviction for taking or knowingly driving a stolen vehicle and to having a strike prior. He also admitted to committing the offense while released on bail or on his own recognizance. The trial court sentenced him to 10 years in prison. The sentence consisted of the upper term of four years for the unlawful taking offense, plus four years for the strike prior, plus two years because Shaffer committed the offense while released on bail or on his own recognizance.

Shaffer appealed the trial court's judgment. Shaffer's appellate counsel filed a brief setting forth the evidence in the superior court and requesting this court review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Among the possible issues identified by appellate counsel was

whether the trial court abused its discretion in imposing the upper term.¹ After reviewing the record for error, including the possible issues identified by counsel, we affirmed the trial court's judgment in all respects. (*People v. Shaffer* (Sept. 4, 2003, D040650) [nonpub. opn.])

In March 2007 Shaffer filed a petition for writ of habeas corpus with the superior court challenging his sentence under *Cunningham v. California* (2007) 549 U.S. ___, 127 S. Ct. 856 (*Cunningham*). The superior court denied the petition because Shaffer's case was final before *Cunningham* and its precursor, *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), were decided. The superior court suggested that Shaffer might have a claim under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the precursor to both *Blakely* and *Cunningham*, but the superior court indicated that Shaffer could not raise the claim by a habeas petition because his appellate counsel could have raised the claim on appeal. The superior court also wondered whether Shaffer might have an ineffective assistance of counsel claim for appellate counsel's failure to raise *Apprendi* on appeal.

¹ Appellate counsel framed this issue generally and did not suggest that the imposition of the upper term violated Shaffer's right to a jury trial.

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D051634 In re Shaffer on Habeas Corpus (continued)

However, the superior court did not reach this question because it had not been directly presented. Instead, the superior court indicated that Shaffer would not be procedurally barred from raising such a claim in the future.

In June 2007 Shaffer filed a second petition for writ of habeas corpus in the superior court. Following the superior court's prior ruling, this time Shaffer claimed his appellate counsel provided ineffective assistance by failing to raise *Apprendi* as an issue on appeal. The superior court denied the petition because it was untimely. The superior court also denied the petition because it failed to state a prima facie case for relief. More particularly, the superior court found that Shaffer failed to present any evidence or authority to establish that, during the time period Shaffer's appeal was pending, the failure to raise an *Apprendi* claim fell below the prevailing standard of care.

Shaffer filed this petition to "appeal" the superior court's second denial order. Because the superior court's order is not appealable, we treat Shaffer's petition as an original petition filed with this court. (*In re Crow* (1971) 4 Cal.3d 613, 621 fn. 8.) We further conclude that the petition fails to state a prima facie case for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Although collectively the *Apprendi*, *Blakely*, and *Cunningham* decisions prohibit a trial court from increasing a sentence based on a fact that has not been found true by a jury, there are exceptions to this rule. The rule does not prohibit sentence increases based on the fact of a prior conviction. (*Blakely, supra*, 542 at p. 301.) In addition, as long as a single aggravating circumstance that renders a defendant eligible for the upper term sentence has been properly established, any additional fact finding by the trial court in selecting the appropriate sentence does not violate the defendant's right to jury trial. (*People v. Black* (2007) 41 Cal.4th 799, 812.)

According to the transcript of Shaffer's sentencing hearing, the trial court imposed the upper term primarily because Shaffer has had numerous prior convictions for similar offenses, including two prison priors, dating back to 1988. The trial court also noted that Shaffer committed the crime while on probation and while released from custody on another pending matter. As discussed above, recidivism is an aggravating circumstance that does not require a jury finding and this circumstance, by itself, rendered defendant eligible for the upper term. Therefore, Shaffer's sentence does not violate the *Apprendi* line of cases and his appellate counsel did not render ineffective assistance by failing to raise an *Apprendi* issue on appeal.

The petition is denied.

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D050039 City of Calexico v. Imperial Irrigation District

The judgment is reversed, and the matter is remanded for the trial court to conduct proceedings and determine whether this case must be prosecuted as a reverse validation action pursuant to Code of Civil Procedure section 863 because the rate increase is a capacity charge as defined in section 66013, subdivision (b)(3) or for any other reason. If the trial court determines this case must be prosecuted as a reverse validation action, it shall dismiss the action. Otherwise, it shall proceed with the action. Each party is to bear its own costs on appeal. Irion, J.;
We Concur: McDonald, Acting P.J., Aaron, J.

D050007 Brannon v. International Thunderbird Gaming Corporation

The judgment is affirmed. O'Rourke, J.; We Concur: Huffman, Acting P.J., Nares, J.

D047796 Sycamore Ridge Apartments v. Naumann et al.

That portion of the trial court's order denying the Naumann defendants' anti-SLAPP motion is affirmed. That portion of the order granting the LaFave defendants' anti-SLAPP motion is reversed. The trial court's order awarding attorney fees and/or costs to the LaFave defendants as the prevailing parties on the anti-SLAPP motion is also reversed. Costs on appeal are awarded to appellant Sycamore Ridge. CERTIFIED FOR PUBLICATION. Aaron, J.;
I Concur: McDonald, J.; I Concur and Dissent (by opinion): Huffman, Acting P.J.

D048729 Vargas v. Hickman et al.

The order denying the preliminary injunction is affirmed and the judgment of dismissal is reversed, with directions to the trial court to reinstate the previously scheduled case management conference to evaluate the current status of the pleadings and to entertain any appropriate request for amendment or dismissal of the amended petition's request for declaratory relief. No costs on appeal shall be awarded. Huffman, Acting P.J.; We Concur: Aaron, J., Irion, J.

D051898 The Copley Press Inc., et al. v. Superior Court of San Diego County/City of Vista et al.

The petition is denied.

D045022 People v. Garces

The sentence is modified to reflect a consecutive three-year middle term plus consecutive three-year great bodily injury enhancement for count 2, and the imposition and suspension of a \$10,000 parole revocation fine under section 1202.45. The trial court is directed to modify the abstract of judgment accordingly and to forward an amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed. Huffman, J.; We Concur: McIntyre, J., Aaron, J.

D051860 In re Garces on Habeas Corpus

The petition is denied.

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D051592 People v. Bernal

Upon filing an abandonment of appeal, the appeal is dismissed and the remittitur is ordered to issue immediately.

D052031 110 Associates LLC v. Grover

Because appellant did not timely pay the filing fee, the appeal is dismissed.

D051958 Phommachanh et al. v. Superior Court of San Diego County/People

The petition is denied. The stay issued November 8, 2007, is vacated.

D048328 Bratcher v. Automobile Club of Southern California

The petition for rehearing is denied.

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D049409 People v. Lawson

The judgment is reversed. Nares, J.; We Concur: Benke, Acting P.J., Haller, J.

D049946 Bloemendaal v. City of El Cajon

The judgment is affirmed. McConnell, P.J.; We Concur: O'Rourke, J., Aaron, J.

D050164 Allied Investments v. Lee Pacific LLC

We reverse the trial court's order, and remand this action with instructions for the trial court to amend the judgment to include Lee Pacific as a judgment debtor. Irion, J.; We Concur: Haller, Acting P.J., Aaron, J.

D048593 People v. Sneed et al.

The judgments are affirmed. Benke, Acting P.J.; We Concur: McDonald, J., McIntyre, J.

D048409 Miletich et al. v. Travelers Property Casualty Insurance Company

The judgment is affirmed. Travelers is awarded its costs of appeal. McIntyre, J.; We Concur: Haller, Acting P.J., McDonald, J.

D047861 Bill Signs Trucking LLC et al. v. Signs Family Limited Partnership et al.

The judgment is affirmed. The defendants are entitled to costs on appeal from the plaintiffs. CERTIFIED FOR PUBLICATION. McConnell, P.J.; We Concur: McIntyre, J., Irion, J.

D048799 Jaffe v. Stieber

The petition for rehearing is denied.

D050358 Vaught et al. v. State of California et al.

The judgment is affirmed. Respondent is awarded costs on appeal. CERTIFIED FOR PUBLICATION. McConnell, P.J.; We Concur: McIntyre, J., O'Rourke, J.

D051728 In re J.H., a Juvenile

The appeal is dismissed. Haller, J.; We Concur: Nares, Acting P.J., Irion, J.

D050417 People v. Arenas

The judgment is modified to strike a five-year prior serious felony enhancement (§ 667, subd. (a)(1)). As so modified, the judgment is affirmed. The superior court is directed to correct the abstract of judgment to (1) remove a section 667, subdivision (a)(1) enhancement, (2) remove a section 667.5, subdivision (b) prior prison term enhancement, and (3) calculate the total sentence as 59 years, four months. The court shall transmit a copy of the corrected abstract of judgment to the Department of Corrections. Haller, J.; We Concur: Benke, Acting P.J., Nares, J.

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D052048 Harbour v. Superior Court of San Diego County/People
The petition is denied.

D051588 In re Pough on Habeas Corpus
The petition is denied.

D049201 Butler v. Rand
The petition for rehearing is denied.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
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D048711 People v. Benitez

The judgment is affirmed. Nares, J.; We Concur: Benke, Acting P.J., Haller, J.

D049445 Nagy v. Pfizer, Inc.

The judgment is affirmed. Pfizer is awarded its costs on appeal.

D050696 In re Nathaniel T., a Juvenile

The order is affirmed. McDonald, J.; We Concur: McConnell, P.J., Nares, J.

D051664 In re J. J., a Juvenile

The appeal is dismissed. Nares, J.; We Concur: Benke Acting P.J., O'Rourke, J.

D052173 People v. Moore

The notice of appeal is premature because no appealable order or judgment has yet been entered. The appeal is DISMISSED without prejudice to refiling a notice of appeal after an appealable order or judgment has been entered.

D052177 In re Aldrete on Habeas Corpus

The denial of a petition for writ of habeas corpus is not appealable. The appeal is dismissed.

D051476 Letts v. Solz

Upon written stipulation filed by the parties to the appeal, the appeal is dismissed and the remittitur is ordered to issue immediately. (Cal. Rules of Court, rule 8.244(c)(2).) Each party to bear own costs on appeal.

D051776 Krystal v. Regents of the University of California

Respondents' motion to dismiss the appeal filed on December 3, 2007, and appellant's opposition to the motion filed on December 17, 2007, have been read and considered by Presiding Justice McConnell and Associate Justices Nares and Irion. The motion to dismiss is GRANTED. The appeal is dismissed.

D049593 People v. Zacarias

The petition for rehearing is denied.

D049922 People v. Ramirez

The conviction of possession of methamphetamine in violation of section 11377, subdivision (a) of the Health and Safety Code is reversed and the matter remanded for the trial court to grant the motion to suppress. Benke, Acting P.J.; We Concur: Haller, J., Aaron, J.

D051637 In re Muneton on Habeas Corpus

The petition is denied.

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D048880 Surfrider Foundation v. City of Solana Beach et al.

The request for dismissal has been read and considered by Justices McConnell, Nares and Irion.
The appeal is DISMISSED.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
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D049862 People v. Twyne

D050986 In re Tywne on Habeas Corpus

The pending petition for writ of habeas corpus, In re Shawn A. Twyne, D050986, is consolidated with the pending appeal, People v. Shawn Tywne, D049862, for consideration and disposition.

D049862 People v. Twyne

D050986 In re Tywne on Habeas Corpus

(Consolidated) The judgment is affirmed. The petition for writ of habeas corpus is denied. Haller, J.; We Concur: Benke, Acting P.J., Aaron, J.

D048004 People v. Hernandez

The abstract of judgment is ordered corrected to indicate the section 12022.5, subdivision (a), finding as to count 1 is stricken and that imposition of sentence as to count 5 is stayed pursuant to section 654. In all other respects, the judgment is affirmed. Benke, Acting P.J.; We Concur: Huffman, J., Haller, J.

D048830 Schutte & Koerting Inc., et al. v. Regional Water Quality Control Board San Diego Region

The judgment is reversed and the matter remanded for an adjudication on the merits of appellants' petition for writ of administrative mandamus. Appellants shall recover their costs on appeal. Nares, Acting P.J.; We Concur: Haller, J., O'Rourke, J.

D052174 Nina G. v. Superior Court of San Diego County/San Diego County Health and Human Services Agency

Associate Justices Nares, McDonald and Irion have reviewed this case. The notice of intent to file writ petition, filed on December 5, 2007, refers to a hearing that took place on November 29, 2007. There was no order made on November 29, 2007 that may be challenged by writ or appeal. The case is accordingly dismissed.

D051533 R.P. Communities LLC et al. v Superior Court of San Diego County/Kehder et al.

The petition for writ of mandate has been read and considered by Justices Nares, McDonald and Irion. The petition is denied.

D050190 People v. Johnson

The judgment is affirmed as to guilt. We reverse the restitution orders under sections 1202.4 and 1202.45. The matter is remanded for consideration of whether a fine is appropriate under former Government Code section 13967. In all other respects, the sentence is affirmed. Haller, Acting P.J.; We Concur: McDonald, J., McIntyre, J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
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D052197 Allen v. Superior Court of Imperial County/People

The petition is denied. The request for accommodations is denied as moot.

D048704 People v. Miller

The judgment is affirmed. Huffman, Acting P.J.; We Concur: Nares, J., Haller, J.

D042545 San Diego Metropolitan Transit v. R.V. Communities

The judgment is affirmed. Costs are awarded to Respondent. CERTIFIED FOR PUBLICATION. Huffman, Acting P.J.; We Concur: McDonald, J., McIntyre, J.

D049243 Eichenberg v. San Diego Medical Services Enterprises LLC

The judgment is affirmed. The parties are to bear their own costs on appeal. Nares, J.; We Concur: Benke, Acting P.J., Irion, J.

D051193 In re E.R. et al., Juveniles

Judgments affirmed. Huffman, Acting P.J.; We Concur: Nares, J., Haller, J.

D051717 In re Kayla M. et al., Juveniles

Upon filing a written abandonment of appeal, the appeal filed by the San Diego County Health and Human Services Agency is dismissed and the remittitur is ordered to issue immediately.

D051652 Homeowners Association of Meadowbrook Estates, Inc. v. The Superior Court of San Diego County/Equity Lifestyle Properties Inc., et al.

The petition is denied.

D050037 In re Carl N., a Juvenile

Appellant's petition for rehearing is granted.

D052157 County of San Diego et al. v. Superior Court of San Diego County/Arterberty M.D. et al.

The petition is denied.